Supreme Court, U.S.
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No. 14-857

In the Supreme Court of the United States

CAMPBELL-EWALD COMPANY,
Petitioner,

v.

JOSE GOMEZ,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF

LAURA A. WYTSMA
MEREDITH J. SILLER
LOEB & LOEB LLP
10100 Santa Monica Blvd.
Suite 2200
Los Angeles, CA 90067
(310) 282-2000

GREGORY G. GARRE
Counsel of Record
NICOLE RIES FOX
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioner

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Advisory Committee on Civil Rules, Rule 23 Subcommittee Report, Advisory Committee Agenda Book (2015), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2015-04.pdf 1, 2, 3, 4

United States Courts, How the Rulemaking Process Works, *available at* http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works.aspx 2

Up to this point, respondent's position has been that the Court need not grant review of the important questions presented because the *dissent* resolved them in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013). Now respondent suggests that this Court should hold off review because of "proposals" discussed at a recent meeting of the Advisory Committee on Civil Rules (Civil Committee). Suppl. Br. 1. That attempt to stave off review is even more speculative and less persuasive than respondent's reliance on the *Genesis Healthcare* dissent. To the extent that the Civil Committee discussion of these issues bears on the petition at all, it just underscores the importance of these issues and need for guidance from *this Court*.

1. First, some perspective. The "proposals" (*id.*) respondent touts are just a part of a range of "conceptual sketches" being contemplated by a "Rule 23 Subcommittee." Advisory Committee on Civil Rules, Rule 23 Subcommittee Report, Advisory Committee Agenda Book (Agenda Book) 243-44 (2015), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2015-04.pdf. And that Subcommittee makes one "key point" in its report to the Civil Committee: **"there is no assurance that the Subcommittee will ultimately recommend any amendments."** *Id.* at 244 (emphasis in original). Rather, the Subcommittee is in the early process of "becom[ing] fully informed about pertinent issues regarding Rule 23 practice today." *Id.* at 243. As its report emphasizes, "[t]**hese conceptual sketches are not intended as initial drafts of actual rule change proposals, and should not be taken as such.**" *See id.* at 244 (emphasis in original). The Subcommittee has not even determined "whether a

rule-based solution would be wise." *Id.* at 325.

Even if the Subcommittee *actually* decided to propose an amendment, it would simply commence a lengthy process in which the proposal could be altered or scrapped. First, the Civil Committee would have to adopt the proposal and report it to the Committee on Rules and Practice and Procedure (Standing Committee). Second, the Standing Committee would have to agree to publish the proposed amendment for notice and comment. Third, based on the public comments that are received, the Civil Committee could "then choose to discard, revise, or transmit the amendment as contemplated to the Standing Committee."[1] Fourth, even if there were no changes, the Standing Committee would have to approve the amendment. Fifth, this Court would then consider the amendment. And finally, if this Court did approve an amendment, Congress would have the opportunity to override it. In the rosiest scenario for proponents of any amendment, this process would take years—and would require this Court's review in any case.

Moreover, such efforts have failed in the past. Even before this Court's decision in *Genesis Healthcare*, the Civil Committee attempted and failed numerous times to amend Rule 68 to address the issues the Rule 23 Subcommittee is now pondering. *See Weiss v. Regal Collections*, 385 F.3d 337, 344 n.12 (3d Cir. 2004). Respondent must know this. The Agenda Book he brings to the Court's attention states that "[t]he committee has studied [Rule 68] twice in the last

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[1] United States Courts, How the Rulemaking Process Works, *available at* http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works.aspx.

two decades, and it provoked a storm of controversy both times." Agenda Book 29; *see id.* at 63-64 (discussing history of proposed revisions); *id.* at 223 ("Past efforts to revise Rule 68 have collapsed. Proposals published for comment in 1983 and 1984 met bitter resistance. A proposal developed some 20 years ago eventually fell under its own weight as the draft was revised to reflect a continually growing number of complications."). There is no reason to assume that any proposed amendment would fare differently today.

Such highly preliminary and speculative "developments" (Suppl. Br. 1) provide no reason for delaying this Court's review of these important issues.

2. In any event, respondent concedes that "the rulemaking process does not directly resolve legal issues that go to the existence of Article III jurisdiction." *Id.* at 2. Nor can an Advisory Committee enlarge or abridge substantive rights, 28 U.S.C. § 2072(b))—such as a plaintiff's dubious right to pursue a "headless" class action or a defendant's right to avoid having to defend in federal court a case that presents no justiciable case or controversy. These are the jurisdictional questions at the heart of the petition. *See* Pet. i. Respondent's reliance on theoretical amendments to Rule 68 or Rule 23 (Suppl. Br. 1) also fails to account for the fact that petitioner has a separate settlement offer not governed by Rule 68 and that offer accordingly may not be affected at all by any possible amendment. Pet. 28; Pet. App. 57a-61a. And the Subcommittee's ruminations do not address the first question presented, concerning whether an offer of complete relief moots an *individual* claim.

Ultimately, the Subcommittee's consideration of these issues just confirms the need for this Court's

review. The very fact that the Subcommittee is raising these issues highlights the importance and recurring nature of questions concerning the effect of offers of full relief on individual claims and class actions alike. Moreover, the Agenda Book materials confirm the circuit conflict—denied by respondent, Opp. 19-21—over whether an offer of complete relief moots a plaintiff's *class* claims, and the need for *this Court* to resolve that conflict. *See* Agenda Book 277. As the Chief Rules Committee Officer for the Administrative Office of the U.S. Courts put it, following *Genesis Healthcare*, the practice of "tendering full relief at the outset [of class actions] seems likely to continue until the Court resolves a current split between the [S]eventh [Circuit] and four other circuits as to whether such a plaintiff can continue to maintain the class action in the presence of such an offer." *Id.* at 229.

To deny review now would result only in additional years of conflict in the lower courts on these important jurisdictional issues—in contravention of Article III and to the detriment of numerous class action plaintiffs and defendants alike on both sides of the issues. Like his attempt to avoid review by pointing to the *Genesis Healthcare* dissent, respondent's proposal to avoid review based on the most speculative of theoretical rule changes is designed solely to serve one interest: avoiding plenary review of *this case*. The issues presented are far too important, and are recurring far too frequently across the country, to allow the conflict and confusion over these issues to persist any longer.

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The petition for a writ of certiorari should be granted.

Respectfully submitted,

LAURA A. WYTSMA
MEREDITH J. SILLER
LOEB & LOEB LLP
10100 Santa Monica Blvd.
Suite 2200
Los Angeles, CA 90067
(310) 282-2000

GREGORY G. GARRE
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LATHAM & WATKINS LLP
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Suite 1000
Washington, DC 20004
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